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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. DAVID CARRINO, Defendant and Appellant.	2d Crim. No. B208906 (Super. Ct. No. 1209864) (Santa Barbara County)

David Carrino appeals from an order finding him in violation of his probation. The court revoked probation and sentenced appellant to 18 months in state prison on his underlying conviction for possessing methamphetamine in violation of Health and Safety Code section 11377, subdivision (a). Appellant contends there was no substantial evidence to support a finding that he violated probation on May 12, 2006, on any ground stated in the notice of violation. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant has a history of mental illness, poor physical health and drug use. In 1997 he was convicted of possessing child pornography in violation of

Penal Code section 311.11, subdivision (b).[1] (Super. Ct. Ventura County, No. CR42019, "the pornography case.") He was granted five years probation in the pornography case and was required to register as a sex offender pursuant to section 290. He violated probation in 1998, 1999 and again in 2001.

In October 2005, appellant was charged with failing to register as a sex offender with his current address in violation of section 290, subdivision (a)(1)(B) and (D). (Super. Ct. Ventura County, No. 2005038151, "the failure to register case.") He initially pled no contest to failure to register, but was later permitted to withdraw his plea, as further discussed below.

In November 2005, appellant was charged with annoying a child in violation of section 647.6, subdivision (a) after he made sexual comments to a boy at a skateboard park. (Super. Ct. Ventura County, No. 2005041942, "the child annoyance case.")

In April 2006, appellant was convicted in the present case of one count of being under the influence of a controlled substance in violation of Health and Safety Code section 11550, subdivision (a). In return for his no contest plea, the prosecutor dismissed two other drug related counts and a prior prison allegation. The trial court granted three years of probation in the present case with terms and conditions that required him to participate in drug treatment pursuant to Proposition 36 (§ 1210.1), obey all laws and report his current address to the probation officer, among other things.

On May 12, 2006, in the failure to register case, appellant was scheduled to appear for sentencing. On his way to court, appellant parked 50 yards from the home of his nine-year-old victim in the child annoyance case. He also drove slowly by a nearby playground and looked at children there. Surveillance officers saw this and followed appellant to court where they reported the incident to

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[1] All statutory references are to the Penal Code unless otherwise stated.

the sentencing judge. They did not arrest appellant and it does not appear from the record that he was charged with any crime for his conduct on May 12.

In the failure to register case, the court allowed appellant to withdraw his no contest plea because the court was no longer inclined to grant probation. The court also granted a conditional release on appellant's own recognizance with conditions that now required him to stay away from public parks and places where children congregate.

On May 25, 2006, in the present case, appellant's probation officer filed a violation report based on the May 12 incident. She alleged violation of a condition of probation and commission of a subsequent non-drug related offense, explaining: "The defendant is a [section] 290 registrant and had allegedly failed to register at his current address," among other things. The notice of violation included a copy of the Oxnard Police Department's incident report for May 12. It did not give notice of failure to update registration with the probation department.[2]

In June 2006, appellant was convicted in the child annoyance case. In August 2006, he was convicted in the failure to register case. In March 2007, appellant's probation in the present case was violated for reasons unrelated to this appeal and reinstated with a new term that required him to stay away from schools.

In April 2008, the present case came on for a probation violation hearing.[3] Deputy Probation Officer Rhonda Kohler described the events of May 12, 2006.[4] She also testified that the most recent address appellant had provided to the probation department as of May 12, 2006, was the home of appellant's parents

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[2] Section 290 required sex offenders to register with the chief of police or county sheriff, not the probation department. (Former § 290, subd. (a)(1)(A), operative Jan. 1, 2006 to Sept. 19, 2006, Stats. 2005, ch. 722 (A.B. 1323).)

[3] Appellant spent time in prison on another case during the interval.

[4] Kohler had taken over the case sometime after May 12, 2006, because appellant's prior probation officer had died.

on Columbia Place.[5] The May 12, 2006, police report identified appellant's then-current address as Frost Drive. Appellant interrupted the proceedings to confirm that he was living on Frost Drive on May 12.

Appellant testified that on May 12, 2006, he was not looking for the nine-year-old victim. He said he was looking for two friends who were going to be witnesses at his hearing in the failure to register case. He conceded that he was required to register as a sex offender pursuant to section 290. He said he did not register because he was coming out of a coma. He said he expected his friends to verify his condition at the May 12, 2006 hearing. He waited outside his friends' house for awhile but they did not come out. Then he drove straight to court and did not stop at a playground. The May 12, 2006, incident report states that the address of appellant's friends was 300 yards from where appellant was parked. The nine year old victim's house was only 50 yards away.

The trial court found appellant to be in violation of probation and not amenable to treatment under Proposition 36. The court did not identify the particular term of probation that appellant violated or the subsequent offense that he committed. The court stated, "It's . . . clear to me that he poses a substantial risk to the community." The court sentenced appellant to three years in state prison on the underlying possession conviction.

DISCUSSION

Appellant contends there is insufficient evidence to support a finding that he violated his probation on a ground that was alleged in the written notice of violation. We agree the written notice was deficient, but find the error harmless because the undisputed evidence established that appellant violated a term of his probation when he did not update his address with the probation department.

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[5] Kohler did not know what address appellant had used for his sex offender registration.

We review a trial court's finding of a probation violation for substantial evidence. (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848.) The trial court's decision is entitled to great deference. We resolve all conflicting evidence and all inferences in favor of the decision. (*Id*. at pp. 848-849.)

Proposition 36 entitles an offender to be returned to probation after a drug related violation in certain circumstances. (§ 1210.1.) When the violation is not drug related, the offender is not entitled to return to probation. (*Id.*, subd. (f)(2).) The prosecution has the burden of proving a non-drug related violation by a preponderance of the evidence. (*People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1066.) The due process clause of the Fourteenth Amendment entitles the probationer to written notice of the claimed violation of probation. (*Black v. Romano* (1985) 471 U.S. 606, 611-612.)

The notice of violation did not identify a specific condition of probation that had been violated. Therefore, appellant's failure to update his address with the probation department cannot support the violation finding.

The notice of violation did identify a specific subsequent offense, failure to register as a sex offender with a current address in violation of section 290. But no substantial evidence supported a finding that appellant violated section 290 while on probation in the present case. The violation of section 290 occurred in 2005, before he was convicted in the present case and granted probation in 2006. His section 290 registration address in 2006 was not established at the revocation hearing. He admitted at the hearing that he had failed to register, but he did not state when. Therefore, there was no substantial evidence to support a finding that appellant violated probation on May 12, 2006, on any ground stated in the notice of violation.

The error was harmless because undisputed evidence at the revocation hearing established that appellant did violate a non-drug related condition of his probation on May 12, 2006. He failed to update his address with the probation department. Although that specific condition of probation was not identified in the

written notice, appellant had a full and fair opportunity to respond to the charge. Officer Kohler testified that appellant's actual address on May 12 was on Frost Drive. Appellant agreed. Officer Kohler testified that the most recent address appellant had provided to the probation department as of May 12 was on Columbia Place. Appellant did not contradict her, although he heard her testimony and testified in response to it. We will not afford appellant a new probation hearing where the act would be futile. (*People v. Arreola* 1994) 7 Cal.4th 1144, 1161-1162.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

I concur:

YEGAN, J.

GILBERT, P.J., Dissenting.

I respectfully dissent.

It may be likely that on remand the trial court will find a violation of probation. But I am less sanguine than my colleagues that such a finding is a certainty.

Under the circumstances here, a change of probation officers, Carrino may have a plausible reason for not notifying the current probation officer about the change in address. And because the notice of probation violation did not specify that this was an issue to be tried at the probation violation hearing, Carrino may well have found it unnecessary to explain why he was living at Frost Drive.

On this record, I am not sufficiently convinced that Carrino's alleged failure to advise about the change in address was necessarily willful. Nor do I think it appropriate to guess that this condition was the reason the trial court denied probation.

My colleagues are put in the awkward position of "second guessing" what the trial court would do. How helpful it would have been had the trial court enlightened the parties and us with a statement of what probation conditions it found Carrino had violated. This omission has my colleagues now acting in the capacity of a trial court.

I would remand.

NOT TO BE PUBLISHED.

GILBERT, P.J.

Deborah Talmage, Commissioner

Superior Court County of Santa Barbara

Wayne C. Tobin, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Michael R. Johnson, Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.